

# ARNOLD & PORTER LLP

Marti Cochran  
Martha\_Cochran@aporter.com

202.942.5228  
202.942.5999 Fax

555 Twelfth Street, NW  
Washington, DC 20004-1206

September 16, 2005

Lawrence Norton  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Attention: Dawn M. Odrowski

Re: MUR: 5421 – Response of Mellon Trust of New England, N.A.

Dear Mr. Norton:

We are counsel for Mellon Trust of New England, N.A. ("Mellon"). We are writing in response to a letter, dated August 11, 2005, from the Federal Election Commission (the "Commission") to Mellon stating that the Commission had found reason to believe that Mellon may have violated 2 U.S.C. § 441b by making a loan to a federal candidate outside the ordinary course of business.

The Commission's inquiry concerns a \$6.4 million mortgage loan (the "Mortgage Loan") made by Mellon to Senator John Kerry in December 2003 when he was a candidate for the Democratic nomination for President. Senator Kerry loaned most of the proceeds of the Mortgage Loan to his presidential primary committee, John Kerry for President, Inc. (the "Committee"), and used the remainder of the proceeds (net of costs and fees) to repay prior loans. The Commission has raised two questions regarding the Mortgage Loan to determine if 2 U.S.C. § 441b may have been violated:

- 1) Whether the Mortgage Loan was made on a basis that assured repayment, and
- 2) Whether the Mortgage Loan bore the usual and customary interest rate of Mellon for the category of the loan involved.

As discussed below, Mellon made the loan on a basis that assured repayment and at the usual and customary interest rate Mellon charged for the category of the loan involved, in accordance with 11 C.F.R. § 100.82. Accordingly, we request that the Commission close the file with respect to Mellon's involvement with this matter.

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FEDERAL ELECTION COMMISSION  
OFFICE OF GENERAL COUNSEL  
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## Factual Background

In December 2003, Mellon loaned Senator Kerry \$6.4 million, secured by a mortgage on a residence in Boston, Massachusetts, held in trust by the T & J Louisburg Square Nominee Trust (the "Trust"), of which Sen. Kerry and his wife are beneficiaries as tenants by the entireties. An independent appraisal valued the property at \$12.8 million; therefore, the loan was in an amount equal to the value of Senator Kerry's one-half interest in the property. The Mortgage Loan was made for 30 years, at a floating interest rate of 2% above LIBOR,<sup>1</sup> with interest only payable for the first ten years.<sup>2</sup>

Although the documents relating to the Mortgage Loan were dated December 19, 2003, no proceeds of the Mortgage Loan were disbursed at that time, because the Federal Truth in Lending Act provides a mandatory period of three business days during which a borrower can choose to rescind the contract,<sup>3</sup> and a creditor is prohibited from disbursing funds until the rescission period has expired.<sup>4</sup> In this case, the rescission period also included an intervening weekend. On December 23, 2003, Mellon wired the proceeds of the initial disbursement, \$2,996,768.21, to the trust account of the settlement attorney, who was acting as Mellon's agent in disbursing the proceeds.<sup>5</sup> The

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<sup>1</sup> The London Interbank Offered Rate or LIBOR is the British Bankers' Association average of interbank offered rates for dollar deposits in the London market based on quotations at 16 major banks.

<sup>2</sup> As the Commission states in its Factual and Legal Analysis, the mortgage instrument is publicly available. The Commission further states that it obtained a copy of the appraisal report.

<sup>3</sup> 15 U.S.C. 1635(a) ("Except as otherwise provided in this section, in the case of any consumer credit transaction . . . in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section.")

<sup>4</sup> 12 C.F.R. § 226.23(c) ("Unless a consumer waives the right of rescission . . . no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.")

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Mortgage was recorded in the Suffolk County Registry of Deeds on that date, and a certificate for title insurance in the amount of \$6.4 million was issued by First American Title Insurance Company to Mellon.<sup>6</sup> On December 24, 2003, after the expiration of the mandatory rescission period, used the proceeds to pay off prior loans and various closing costs and disbursed the remaining \$1,787,965.80 to Senator Kerry in accordance with the HUD settlement sheet.<sup>7</sup> On January 5, 2004, Mellon disbursed the remaining \$3.4 million proceeds of the loan.<sup>8</sup>

## Applicable Law

Under the Federal Election Campaign Act of 1971, as amended, "[i]t is unlawful for any national bank . . . to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office." 2 U.S.C. § 441b(a). A "contribution" includes a "loan" unless such loan is made "by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation . . . in accordance with applicable law and in the ordinary course of business." 2 U.S.C. § 431(8)(B)(vii). The Act and Commission regulations provide that a loan is "made in the ordinary course of business if it: (1) [b]ears the usual and customary interest rate of the lending institution for the category of loan involved; (2) is made on a basis that assures repayment; (3) is evidenced by a written instrument; and (4) is subject to a due date or amortization schedule." 11 C.F.R. § 100.82(a)(1)-(4).<sup>9</sup>

The Commission's regulations provide that a loan is made on a basis that assures repayment if the lending institution has a perfected security interest in collateral owned

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<sup>9</sup> The Mortgage Loan was evidenced by a written instrument and subject to a due date or amortization schedule. See copy of the Mortgage as recorded in the Suffolk County Registry of Deeds.

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by the candidate, the fair market value of which is equal to or greater than the amount of the loan and any senior liens as determined on the date of the loan. *Id.* § 100.82(e)(1)(i).

## Discussion

### 1. The Mortgage Loan was made on a basis that assured repayment.

In its Factual and Legal Analysis, the Commission acknowledged that, in light of the \$12.8 million appraised value of the property, up to 50% of the value of the property, \$6.4 million, was available for Senator Kerry as a joint beneficial owner of the property to use as collateral for the loan. The Commission stated, however, that "a review of publicly available mortgage records raises the possibility that there may have been a senior lien on the property on the date of the Mellon Trust loan." The Commission identified two liens, which we address below.

Citizens Mortgage Loan of \$820,000. The Commission identified an October 1996 \$820,000 mortgage lien in favor of Citizens Bank. A copy of this lien recorded in the Suffolk County Registry of Deeds includes a "Confirmatory Discharge of Mortgage and Security Agreement" dated December 12, 2003 and filed on December 23, 2003.<sup>10</sup>

On its face, the "confirmatory" nature of the Citizens discharge confirms that the debt secured by the mortgage had been fully paid prior to December 12, 2003. Since delays in recording mortgage discharges are not unusual, title searches often turn up old liens that have been satisfied in full but with respect to which a discharge has never been recorded. When the October 1996 mortgage turned up in the title search ordered by Mellon's settlement attorney, he obtained confirmation from Citizens that the lien previously had been satisfied in full, and he recorded the discharge on December 23, 2003.

Thus, the prior \$820,000 mortgage had been paid in full and a confirmatory discharge filed prior to the date of disbursement of the Mortgage Loan. The Citizens mortgage therefore did not constitute a senior lien on the property when the first portion of the Mortgage Loan was funded on December 24, 2003 and did not impair Mellon's security interest in the collateral.

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<sup>10</sup> As the Commission noted in the Factual and Legal Analysis, this document is publicly available. Therefore, we are attaching as Exhibit 6 only the Confirmatory Discharge, which also may be found at page 33505 071 in the Suffolk County Registry of Deeds.

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Citizens Home Equity Line of \$450,000. In its Factual and Legal Analysis, the Commission also identified an August 23, 1999, mortgage in favor of Citizens that secured a home equity line of credit issued to Senator Kerry. The Commission stated that this mortgage appears to have secured the sum of \$350,000 drawn by Senator Kerry in December 2003, which he in turn lent to his Committee. The Commission noted that the Suffolk County database reveals a discharge of the mortgage dated January 13, 2004, but not filed until April 20, 2005.

As noted above, Mellon wired the net proceeds of the initial disbursement (\$2,996,768.21) of the Mortgage Loan to the trust account of Mellon's settlement attorney on December 23, 2003.<sup>11</sup> On that same date, a title insurance policy was issued to Mellon by First American Title Insurance Company, insuring Mellon against any loss or damage incurred by reason of, among other things, the "priority of any lien or encumbrance over the lien of the insured mortgage" up to the \$6.4 million limit of the policy.<sup>12</sup> The title insurance company would not issue such a title policy unless it had confidence that prior liens were satisfied or would be satisfied from the proceeds of the Mortgage Loan.

On December 24, 2003, [redacted] disbursed funds in accordance with the HUD settlement sheet,<sup>13</sup> which shows that, of the \$2,996,768.21 to be disbursed, proceeds of \$445,129.65 were allocated to payoff of Citizens Bank.

Accordingly, on December 24, 2003, [redacted] sent a check drawn on his trust account in the amount of \$445,129.65 to Citizens Bank for "Payoff Acct . . . John F. Kerry, together with written instructions from John Kerry to "permanently" close the account and issue a discharge of the mortgage.<sup>14</sup> The cover letter from [redacted] gave further instructions to pay off the account with interest through December 29, 2003, which, given the intervening Christmas holiday and weekend, was two business days after the check was mailed and the estimated date the payoff check would arrive at

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Citizens. Because proceeds from the Mortgage Loan were used to pay off the Citizens loan in full, Mellon's security interest was considered the first lien on the property, with priority over the Citizens lien.<sup>15</sup> Furthermore, since the account closure instructions to Citizens were transmitted along with the payoff check, Citizens had clear instructions to close the account and permit no further borrowing under the credit line.

We understand that, in refinancings involving institutional lenders, it was customary practice in Massachusetts for the new lender's settlement attorney to pay off the exact amount of outstanding liens with funds from his trust account, with the understanding that the prior lender receiving a payoff would send a discharge back to the attorney, to be recorded at the registry of deeds at a later time. This practice was followed in this refinancing. Although Citizens did not sign a discharge of the loan drawn on the \$450,000 credit line until January 13, 2004 and satisfaction of the mortgage was not recorded until much later, Mellon had perfected its security interest in the collateral securing the \$6.4 million Mortgage Loan as of the date of the loan disbursal. Moreover, the Mellon Mortgage Loan was recorded on December 23, 2003, and its security interest in the property was fully protected under its title insurance policy against any loss due to any other lien, up to \$6.4 million. Under these circumstances, the fact that satisfaction of the mortgage was not recorded in the local land records would not impair Mellon's security.

2. The interest rate on the Kerry loan was Mellon's usual and customary rate for the category of loan involved.

The Mortgage Loan was issued under Mellon's Adjustable Rate Mortgage Program on the same terms and conditions that were available to numerous other borrowers during the same period.<sup>16</sup> The spreadsheet included with Exhibit 9 shows all one-month LIBOR loans closed by Mellon during the period October 1, 2003 through February 28, 2004.<sup>17</sup> This product is a 30-year mortgage, at a floating rate of 2% above LIBOR, adjusted each month, with interest only payable for the first ten years.

Of the 52 mortgage loans

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<sup>15</sup> See Restatement (Third) of Property: Mortgages, § 7.6 cmt. e (1997) (lender that pays off another loan secured by a mortgage as part of a refinancing replaces through equitable subrogation the prior mortgagee in the priority lien position); *Kim v. Lee*, 31 P.3d 665 (Wash. 2001); *Metropolitan Life Ins. Co. v. Craven*, 101 P.2d 237 (Or. 1940).

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made under this program during the five-month period, 48, including the Mortgage Loan, were made at an interest rate of 3.125%.<sup>18</sup> Thus, the loan bore Mellon's usual and customary rate for the category of loan involved.

\* \* \*

Based on the foregoing, it is clear that Mellon made the Mortgage Loan on a basis that assured repayment and at the usual and customary interest rate Mellon charged for the category of the loan involved, in compliance with 2 U.S.C. § 441b and Commission regulations. Accordingly, we request that the Commission close the file with respect to Mellon's involvement with this matter.

In accordance with 11 C.F.R. § 4.5, Mellon requests confidential treatment of this letter and the enclosed documents, Bates numbers 1-41, each of which contains confidentiality legends, except for document numbers 30, 38-39. The documents for which we request confidential treatment are not available to the general public. The documents contain sensitive information relating to the personal financial information of Mellon's customer, with whom Mellon has a confidential banking relationship. The documents further contain confidential business information regarding Mellon's loan operations. We note, in particular, the highly sensitive nature of account information, disclosure of which could present the risk of unauthorized access to the accounts.<sup>19</sup> On Mellon's behalf, we request that Mellon be provided with advance notice by telephone and facsimile or express mail of any request to the Commission to disclose these documents, so that Mellon and its counsel may be heard on the question of the propriety of any proposed disclosure. Such notice may be provided to the undersigned. In addition, we request that the documents produced herewith not be made publicly available by the Commission and that they be returned to Mellon at the conclusion of the Commission's investigation. We are providing a duplicate copy of this letter and a self-addressed stamped envelope, and request that they be used to provide us with a written acknowledgement of Mellon's request for confidential treatment. We also attach hereto a copy of the letter to the Commission's Freedom of Information Act officer requesting confidential treatment, which we also are mailing on this date.

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<sup>18</sup>

<sup>19</sup> Certain exhibits contain redactions of certain account sensitive information.

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We trust that this letter responds to your request. If you have any questions about the information in this letter, please call Martha Cochran at 202-942-5228.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Cayne", followed by a long horizontal line extending to the right.

Howard Cayne  
Martha Cochran

Enclosures

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12/23/2003 Doc: 0090

33505 071

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**CONFIRMATORY DISCHARGE OF MORTGAGE AND SECURITY AGREEMENT**

For Value Received Citizens Bank of Massachusetts holder of a Mortgage Security Agreement from Linda K. Smith and Mellon Bank N.A. Trustess of the T & J Louisburg Square Nominee Trust, to Citizens Bank of Massachusetts, acknowledged on October 19, 1996 and recorded with Suffolk County Registry of Deeds in the state of Massachusetts, at Book 20943 Page 178, hereby discharges and releases any rights or interests it may have by virtue of said Mortgage and Security Agreement instrument.

Dated this 12th day of December 2003

Citizens Bank of Massachusetts

By: Debbie Chesson  
Debbie Chesson  
Its Duly Authorized Officer

Witness: Michele Robicheau  
Michele Robicheau  
SUFFOLK REGISTRY  
2003 DEC 23 AM 9:35  
REC'D/ENR'D & EXAM ATTES  
REGISTER OF DEEDS

Property Location: 19 Louisburg Square, Boston, Massachusetts

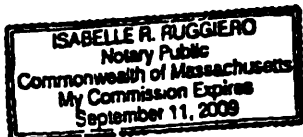
Commonwealth of Massachusetts  
County of Middlesex, SS:

On this 12th day of December 2003, before me personally came Debbie Chesson, Loan Operations Officer of Citizens Bank of Massachusetts to me known who, being by me duly sworn, did depose and say that she is a Duly Authorized officer of Citizens Bank of Massachusetts described in and which executed the foregoing instrument; and that she has signed her name to said instrument.

NOTARY PUBLIC

Isabelle R. Ruggiero My Commission Expires September 11, 2009

Isabelle R. Ruggiero



Return To:

PAUL J. LITWIN, ESQ.  
SHAMES & LITWIN  
10 St. James Avenue, 11th Flr.  
Boston, MA 02116

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**Mellon**

**Mellon Private Mortgage  
LIBOR ONE MONTH ADJUSTABLE RATE  
MORTGAGE LOAN PROGRAM DISCLOSURE**

This disclosure describes the features of the Adjustable Rate Mortgage (ARM) program you are considering. Information on other ARM programs is available on request.

**HOW YOUR INTEREST RATE AND PAYMENT ARE DETERMINED**

Your interest rate will be based on an index plus a margin. The "Index" is the One Month London Interbank Offered Rate (LIBOR) published daily in The Wall Street Journal in its "Money Rates" table as the British Bankers' Association average of interbank offered rates for dollar deposits in the London market based on quotations at 16 major banks. The Consumer Handbook on Adjustable Rate Mortgages (which is being given to you along with this Disclosure) defines the margin as the number of percentage points added to the Index. Your margin will depend on the number of points you pay. Ask for our current margins.

Under this Program you will pay interest only for the first ten years of the loan term (the "Interest-Only Period"). During the Interest-Only Period, your payment will be computed using the then current interest rate and the outstanding loan balance. After the first ten years of the loan term you will pay both interest and principal (the "Amortization Period"). During the Amortization Period, your payments will be based on the then current interest rate, loan balance and remaining loan term.

Your interest rate at each adjustment will equal the then current Index plus the margin rounded to the nearest one-eighth of one percent (0.125%), unless your interest rate "caps" limit a change in the interest rate as discussed below. In the event that the sum of the Index and margin is exactly one-sixteenth (0.0625) more or less than the nearest one-eighth of one percent (0.125%), your interest rate for that adjustment period will be rounded to the next highest one-eighth of one percent (0.125%).

Your initial interest rate may not be based on the formulas used to make later adjustments. Any difference between your actual initial interest rate and the rate that would be in effect if the formulas used to make later adjustments were used is called a "discount". Ask for our current initial interest rates.

**HOW YOUR INTEREST RATE CAN CHANGE**

Your interest rate adjusts and can change every month.

Over the term of the loan, your maximum interest rate will be 10.75%.

Over the term of the loan, your minimum interest rate will be 3.00%.

**HOW YOUR MONTHLY PAYMENT CAN CHANGE**

Your monthly payment can change every month based on changes in the interest rate. Your monthly payment amount can increase or decrease substantially based on changes in the interest rate.

For example, on a \$10,000, 30-year loan with an initial interest rate of 3.75% (the rate in effect as of the last week of April 2002, which is the sum of the Index (1.84125%) plus a margin in effect as of the last week of April 2002 (1.875%) rounded to the nearest one-eighth of one percent (0.125%), less a discount of

0.00%) and the caps described above, the maximum amount that the interest rate could rise under this program is 7.00 percentage points, to 10.75%. During the Interest-Only Period, the monthly payment amount can rise from an initial monthly payment of \$31.25 to a maximum of \$89.58 at the first adjustment, in month two. During the Amortization Period, the monthly payment can reach a maximum of \$101.52 in the eleventh year.

To see what your monthly payment would be, divide your proposed mortgage amount by \$10,000, then multiply the monthly payment by that amount. For example, during the Interest-Only Period in the example above, the initial monthly payment for a mortgage amount of \$60,000 would be \$60,000 divided by \$10,000 = 6; 6 x \$31.25 = \$187.50 per month.

You will be notified of each payment amount in writing not less than 25 days before that payment is due. This notice will contain information about your interest rates, payment amount and loan balance.

**HOW TO CONVERT TO A FIXED RATE LOAN**

Under this Program, you have the option to convert your ARM loan to a fixed rate loan at any time after the first year.

Your interest rate may increase if you exercise the conversion option.

The percentage added to the commitment rate used to determine your new rate ("conversion margin") may vary depending on loan term.

For eligible properties that are not second homes or units in high rise condominiums, when you convert to a fixed-rate loan, your new interest rate will equal the Federal National Mortgage Association (FNMA) 60 day mandatory commitment rate plus .75% rounded to the nearest one-eighth of one percent. For second homes, your new interest rate will equal the Federal National Mortgage Association (FNMA) 60 day mandatory commitment rate plus 1.00% rounded to the nearest one-eighth of one percent. For high rise condominiums, your new interest rate will equal the Federal National Mortgage Association (FNMA) 60 day mandatory commitment rate plus 1.375% rounded to the nearest one-eighth of one percent. If you choose to convert your loan, your loan will become fully amortizing effective the date of your conversion.

In order to convert you must meet the Lender's then current credit and appraisal standards. An updated appraisal, credit report and title endorsement will be required. You will also be required to submit updated financial documentation for Lender's review. You will be responsible for all fees associated with these requirements, including a \$450.00 non-refundable conversion fee.

Please note the following limitations with respect to the convertibility of your loan: the principal balance must be \$1,000,000.00 or less at the time of conversion; loans secured by co-operative apartments, loans structured as blanket loans or having additional collateral and, "cash out" refinances of second homes cannot be converted; loans secured by high-rise condominiums (more than 8 stories) are only available in the metropolitan areas of Chicago, Honolulu, Los Angeles, New York, San Diego, San Francisco and D.C.

With respect to the conversion periods and the conversion margins set forth above, these are periods and margins we have offered recently. Ask for our current conversion periods and conversion margins.

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## PREPAYMENT PENALTY

THIS LOAN PROGRAM HAS A PREPAYMENT PENALTY. THE PENALTY WILL DEPEND ON THE PROGRAM YOU HAVE SELECTED. You may elect to lower the initial rate of interest on your loan by choosing our Rate Reduction Option. Under the Rate Reduction Option, the initial periodic rate you pay is lower than the standard product initial rate, but with a higher penalty for early principal repayments. Our standard product has a slightly higher periodic rate, but a lower repayment penalty. Ask about the terms of our current Rate Reduction Option.

If you have not selected the Rate Reduction Option, the prepayment penalty is 1.00% for the first year, subject to applicable state law. You may prepay up to 10% of the original principal balance in the first year with no penalty. Thereafter, there is no penalty.

If you have selected the Rate Reduction Option, the prepayment penalty is in effect for 3 years. The penalty is 2.00% for the first and second years, and 1.00% for the third year, subject to applicable state law. You may prepay up to 10% of the original principal balance in each of the first three years with no penalty. Thereafter, there is no penalty.

### Construction-Permanent Program

If you have applied for the construction-permanent program, the initial construction period will be 18 months during which construction disbursements will be made by the lender, at borrower's request, as work is completed. The construction period is included in the 10 year interest-only period. Interest will accrue on the amounts disbursed in accordance with the provisions of this ARM program.

Mellon (FEC 8/11/05) 39

<sup>1</sup> The Rate Reduction Option is not available for loans secured by property in South Carolina or Maine, and may not be available for certain loans secured by property in New Jersey, Rhode Island or New York.